LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

October Term, 1947

No. [illegible]

UNITED STATES OF AMERICA,

Petitioner,

vs.

[illegible] BEACH LIVE STOCK COMPANY, a Corporation,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

J. SHELDON POTTER,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

[illegible] REBECA,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

[illegible] JAMES A. REDPATH, a Corporation,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

ARCHIBALD F. STEPHENS,

Defendant.

UNITED STATES OF AMERICA,

Petitioner,

vs.

[illegible] LAS SECURITIES COMPANY,

Defendant.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

Brief of the States of California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington, Amici Curiae.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

SUBJECT INDEX.

PAGE

Interest of amici curiae 2

Opinions below and jurisdiction 2

Statement of the case 2

Questions argued 3

Summary of argument 3

I.

The water rights involved in the cases at bar are vested property rights and are compensable under the Fifth Amendment 4

II.

The opinion of the Court of Claims below does not adequately state the effect of the Amendment of 1928 to Article XIV, Section 3, of the California Constitution 19

Conclusion 26

TABLE OF AUTHORITIES CITED.

CASES. PAGE

Arizona v. California, 283 U. S. 423 11
Barrett v. Metcalf, 12 Tex. Civ. App. 247, 33 S. W. 758; error den., 93 Tex. 679 9
Chow v. Santa Barbara, 217 Cal. 673 21
Continental Land Co. v. United States, 88 F. 2d 104; cert. den. 302 U. S. 715 11
Crab Creek & Moses Lake, In re, 134 Wash. 7, 235 Pac. 37 9
Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535 9
Herminghaus v. So. Calif. Edison Co., 200 Cal. 81 ..... 8, 19, 22
Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677 ..... 21, 22, 24
Ickes v. Fox, 300 U. S. 82 ..... 13, 25
Ide v. United States, 263 U. S. 497 13
Irwin v. Phillips, 5 Cal. 140, 63 Am. Dec. 113 5
Lodi v. East Bay Municipal Utilities District, 7 Cal. 2d 316 21
Los Angeles v. Aitken, 10 Cal. App. 2d 460, 52 P. 2d 585 9
Luxe v. Haggin, 69 Cal. 255 ..... 7, 8, 9
Mason Co. v. Tax Commission, 302 U. S. 186 13
Meridian Ltd. v. San Francisco, 13 Cal. 2d 425 ..... 23, 24
Nebraska v. Wyoming, 295 U. S. 40 ..... 13, 17
Nebraska v. Wyoming, 325 U. S. 587 ..... 13, 25
New Jersey v. New York, 283 U. S. 336 18
Peabody v. Vallejo, 2 Cal. 2d 351 ..... 7, 21, 22, 23, 24
Rancho Santa Margarita v. Vail, 11 Cal. 2d 501 21
Reno S. Works v. Stevenson, 20 Nev. 269, 21 Pac. 317 6
Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489 ..... 21, 23
Turlock Irrigation District v. White, 186 Cal. 183 21
United States v. Chandler-Dunbar Co., 229 U. S. 53 ..... 15, 16, 17, 18
United States v. Utah, 283 U. S. 64 11
United States v. Willow River Power Co., 324 U. S. 499 16

STATUTES PAGE

Act of Congress of July 26, 1866 (14 Stat. 251, R. S. Sec. 2339, 43 U. S. C., Sec. 661) 6, 17
Act of Feb. 25, 1905 (33 Stat. 814) 10
Act of June 12, 1906 (34 Stat. 259) 10
Act of May 18, 1938 (52 Stat. 403—Fort Peck, Mont., Project) 11
California Constitution, Art. XIV, Sec. 3 ..... 3, 19, 25
California Statutes, 1850, p. 219 6
Desert Land Act of 1879, 16 Stat. 217 9
Flood Control Act of 1944, Sec. 1(b) (Act of Dec. 22, 1944, 58 Stat. 887) 14
Reclamation Act of June 17, 1902 (32 Stat. 388, 390) 10, 11, 12, 13, 14, 25
Reclamation Act of June 17, 1902, Sec. 7 12
Rivers and Harbors Act of Aug. 26, 1937, Sec. 2 (50 Stat. 834, 850) 14
Rivers and Harbors Act of Oct. 17, 1940, Sec. 2 (54 Stat. 1198, 1199) 14
Rules of the United States Supreme Court, Rule 27, Subd. 1 2

TEXTBOOKS

25 California Jurisprudence, Sec. 29, p. 1029 8
5 California Law Review, p. 142, Hess, The California Irrigation Right 9
10 California Law Review, p. 443 (reprinted in 189 Cal. 779), Shaw, The Development of the Law of Waters in the West.. 9
35 Congressional Record, p. 6678 12
1 Wiel, Water Rights in the Western States (3d Ed.), Sec. 18, pp. 18-21 8
1 Wiel, Water Rights in the Western States (3d Ed.), Sec. 339, p. 360 9

IN THE

Supreme Court of the United States

October Term, 1948.

Nos. 229-304

UNITED STATES OF AMERICA, *Petitioner,*

vs.

GERLACH LIVE STOCK COMPANY, a Corporation.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

J. SHELDON POTTER.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

MARTIN ERRECA.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

JAMES J. STEVINSON, a Corporation.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

ARCHIBALD J. STEVINSON.

UNITED STATES OF AMERICA, *Petitioner,*

vs.

3-H SECURITIES COMPANY.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

Brief of the States of California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington, Amici Curiae.

Interest of Amici Curiae.

Amici curiae are states in the arid and semi-arid West. Their interest is that of *parens patriae*. They are concerned lest the stability of the economic structure of their irrigated agriculture be upset by a decision supporting Petitioner's claims. It appears to them that the logical extension of Petitioner's theory that the water rights in the cases at bar may be destroyed without compensation would permit the United States to confiscate at will, and redistribute, any water rights, riparian or appropriative, on any stream which under the decisions of this Court is subject to the constitutional authority of Congress in aid of navigation. These states appear because they consider such a rule would be destructive of their prosperous communities which are founded on irrigated agriculture, would be inherently unjust, and would not be in conformity with the law.

Opinions Below and Jurisdiction.

These are adequately covered by the Petition (p. 2). (*Amici curiae* are unable to cite herein Petitioner's main brief, inasmuch as it was not filed February 7th, in accordance with Rule 27, subdivision 1.)

Statement of the Case.

Amici curiae assume that statements of the case made by Petitioner, Respondents and other *amici curiae*, are correct and adequate.

Questions Argued.

I.

All present *amici curiae* are interested in the following question:

1. Whether riparian rights to the use of water of a navigable river in the West, if taken by the United States for public use, are or are not compensable.

Amicus curiae, State of California, alone, has a special interest in the following question:

2. Whether the opinion of the Court of Claims or the briefs of the parties correctly state the effect of the 1928 Amendment to Article XIV, Section 3, of the California Constitution.

Summary of Argument.

I. THE WATER RIGHTS INVOLVED IN THE CASES AT BAR ARE VESTED PROPERTY RIGHTS AND ARE COMPENSABLE UNDER THE FIFTH AMENDMENT.

II. THE OPINION OF THE COURT OF CLAIMS BELOW DOES NOT ADEQUATELY STATE THE EFFECT OF THE AMENDMENT OF 1928 TO ARTICLE XIV, SECTION 3, OF THE CALIFORNIA CONSTITUTION.

I.

The Water Rights Involved in the Cases at Bar Are Vested Property Rights and Are Compensable Under the Fifth Amendment.

In the western one-third of the United States the total precipitation of rain and snow, if fully conserved and put to use, is only enough for the irrigation and domestic uses of four per cent of the land. This block of states between Kansas and the Pacific Coast, Canada and Mexico, a region 1,000 miles wide and 2,000 miles long, is the arid and semi-arid West. These facts are drawn from an official publication of the Department of the Interior ("Conservation in the Department of the Interior," Wilbur and DuPuy, 1932, pages 1-2), in which it is said:

> "In two-thirds of the Nation water and to spare is always available. Little thought need be taken of it. But in the West it is the one element by which development is measured, and it will remain so through all the years to come. Water is life beyond meridian 100."

In most of the West no crops can be raised, human beings cannot exist and even wild life is scanty, without artificially conserved and controlled water supplies. On the other hand, where irrigation has been made possible, land theretofore growing only sagebrush, greasewood and cactus has been transformed, by reason of the native fertility of the soil and the dependability and regularity of controlled irrigation, to the production of crops on a scale even greater than that of the lands in the humid East. Fruitful oases, separated commonly by scores or hundreds of miles of barren deserts, now are scattered through the West. And, except for such further development as is

possible within the limits of the scanty precipitation, this is the whole agricultural heritage of the West.

Just 100 years ago, when the 17 western states were barren, vacant and unoccupied, save by small bands of roving Indians and a few white fur trappers, a great mass migration took place from the eastern states to California. In the Gold Rush of 1849, hundreds of thousands made their way across the plains, over the Isthmus of Panama, or around Cape Horn, to seek gold in the canyons of the Sierra Nevada. They found that the first requirement of placer mining was water with which to separate gold from sand in miners' pans or sluice boxes. Immediately, therefore, works for diversion and transportation of water, first rudimentary, then more elaborate, were undertaken. Dams for reservoirs, and miles of ditches and flumes were constructed by individuals or mining companies.

The pioneer miners rapidly crystallized rude social institutions, including miners' courts, mining district organizations, and rules of property, arising, *ex necessitate*, out of conflicts which had arisen among them. The cardinal principle of these rules was that the first taker of water from a stream acquired a right to the use of the water—in the classic phrase—"first in time is first in right." Very shortly the Supreme Court of California recognized these "customs of miners" in *Irwin v. Phillips* (1855), 5 Cal. 140, 63 Am. Dec. 113. The Court said (p. 146):

> "If there are, as must be admitted, many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of

res judicata. Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by prior appropriation, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development."

This was written in spite of the fact, not mentioned by the Court, that the first Legislature of California had adopted the common law of England as the rule of decision in California (Cal. Stats. 1850, p. 219). (*Cf. Reno S. Works v. Stevenson,* 20 Nev. 269, 21 Pac. 317.)

The customs of miners in relation to appropriation of water were soon confirmed by the Act of Congress of July 26, 1866 (14 Stat. 251, R. S. Sec. 2339, 43 U. S. C. Sec. 661) which provides:

"Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

As the placer mines were gradually worked out, the use of water went through the transition from mining to agriculture. Also, as pioneer settlers spread through the West and occupied those valleys where fertile land and water existed in convenient juxtaposition, there rapidly spread through the 17 western states a recognition of the practical necessity of a system of appropriative water rights.

This followed, because under the climatic conditions existing in most of the West, application of the correlative right of all riparian owners under the common law rule imposed on settlers a strait-jacket, in which no one could get enough water for his needs. Only by the appropriative system could whole streams be diverted from their beds and made the foundation of large and permanent agricultural development. Each of the states in turn, by statute or decision, established the peculiar institution of western water rights, either exclusively by appropriation, or, in the case of California and some others, by appropriation, existing concurrently with the common law riparian right.[1]

In each of the seventeen western states, the conditions of the Act of 1866, that the appropriative rights be vested rights and be "recognized and acknowledged by the local customs, laws, and the decisions of courts," have been fully and aptly satisfied. At the same time the states in the eastern and western tiers (Washington to California and North Dakota to Texas), nine in all (*Peabody v. Vallejo*, 2 Cal. 2d 351, 365), have recognized the existence, in some form, of riparian rights. Each of these

---

[1]In California the combined system was recognized in the great case of *Lux v. Haggin* (1886), 69 Cal. 255.

rights, whether riparian or appropriative, is real property; is vested; is protected by the courts by injunction or judgments for damages; if taken for public use, is compensable; each of them is recognized to be the ownership of a usufructuary right, not the ownership of the stream itself or the water therein, but of the continuing right to use the water. The riparian right, in California, is more than an easement; it is part and parcel of the land.

Lux v. Haggin, 69 Cal. 255, 264, 390, 391-394;

Herminghaus v. So. Calif. Edison Co., 200 Cal. 81, 95 *et seq;*

Wiel, "Water Rights in the Western States," 3rd Ed., Vol. 1, Sec. 18, pp. 18-21;

25 California Jurisprudence, 1029, Sec. 29.

Just as there is no distinction in the law of waters of the western states between these legal characteristics of riparian and appropriative rights, so also no distinction has been made in the terms or application of the law of most of these states between rights to the use of water of navigable and innavigable streams. The state acts are generally silent on this point.[2] However, perhaps the first appropriations and riparian claims arose on some of the few great rivers of the West, such as the Columbia, Missouri, Sacramento-San Joaquin and Colorado, and their major tributaries. This, naturally, occurred because of

---

[2]It is said that a few states, *e.g.*, South Dakota, Washington, and perhaps Nebraska, have by statute or decision limited either appropriative or riparian rights to innavigable waters. Whatever the rationale, mistaken deference to supposed federal supremacy or otherwise, it is not believed that these deviations impair the general rule.

the volume and dependable flow of these streams and the fact that they coursed through large arable valleys.

Wiel, "Water Rights in the Western States," 3rd Ed., Vol. 1, Sec. 339, p. 360 and cases cited;

In re Crab Creek & Moses Lake, 134 Wash. 7, 235 Pac. 37;

Heilbron v. Fowler Switch Canal Co., 75 Cal. 426, 17 Pac. 535;

Los Angeles v. Aitken, 10 Cal. App. 2d 460, 468, 52 P. 2d 585;

Barrett v. Metcalfe, 12 Tex. Civ. App. 247, 33 S. W. 758; error denied 93 Tex. 679.[3]

The Act of 1866 was general in its terms, not limited either to navigable or innavigable streams. It permitted development to proceed upon the only lines which were economically practicable. Under it, and under the succeeding Desert Land Act of 1870,[4] the development of the West proceeded under the private initiative of the pioneers and without substantial governmental participation until, in 1902, the Reclamation Act was adopted and the United

---

[3]For brief historical reviews of the rise of the law of waters in California, reference is made to "The California Irrigation Right," R. S. Hess, 5 Cal. Law Rev. 142, and "The Development of the Law of Waters in the West," Chief Justice Lucien Shaw of California, 10 Cal. Law Rev. 443 (reprinted in 189 Cal. 779), in which latter some reference is made (p. 453 *et seq.*), to the initiation of the holdings of Miller & Lux in the San Joaquin Valley, which led to the decision in *Lux v. Haggin*, *supra*, and which are the subject of the cases at bar.

[4]16 Stat. 217, which specified that all patents to public lands should be "subject to any vested and accrued water rights" under the Act of 1866, but which was limited by its express terms to innavigable streams.

States commenced to finance and construct irrigation works in the 17 western states.[5]

Section 8 of the Reclamation Act of June 17, 1902 (32 Stat. 388, 390), provides:

> "That nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right."

This section broadens greatly the recognition by the United States of the integrity of state water laws, in that it is not confined, as was the Act of 1866, to the recognition of water rights appropriated upon public lands nor, as was the Desert Land Act, to innavigable streams. It is to be noted that Section 8 above is not limited by its terms either to innavigable or navigable streams, although in some references it has been assumed to be limited to innavigable streams.

---

[5]Texas was added to the original 16 states by Acts of Feb. 25, 1905 (33 Stat. 814) and June 12, 1906 (34 Stat. 259).

Although the Act of 1902, while covering broadly the field of Federal reclamation, did not contain specific reference to navigable streams, nevertheless, the provision in Section 8 that "nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof" strongly indicates that the framers of the act had in mind the protection of rights of "any landowner, appropriator, or user of water" in navigable streams. The great interstate streams of the West, to which this clause is applicable, are almost without exception navigable. The Columbia, the Missouri and the Colorado are typical interstate streams of the West. Each has been found to be to some extent navigable and subject to the Federal power to improve navigation.[6]

Considering the obvious necessity that the settled and developed projects in the West maintain the sanctity of their indispensable water rights, it is easy to understand that, much as the West desired Federal development, the Act of 1902 could not have been adopted had it not fully and emphatically protected the existing homes and farms of the pioneers.

---

[6] *Columbia:*
Continental Land Co. v. United States, 88 F. 2d 104 (Cert. den. 302 U. S. 715).

Missouri:
Act of May 18, 1938 (52 Stat. 403—Fort Peck, Montana, Project).

Colorado:
United States v. Utah, 283 U. S. 64, 89;
Arizona v. California, 283 U. S. 423, 455, 456.

Section 8 was accompanied by a corollary in Section 7, which reads:

> "That where in carrying out the provisions of this act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney General of the United States upon every application of the Secretary of the Interior, under this act, to cause proceedings to be commenced for condemnation within 30 days from the receipt of the application at the Department of Justice."

The sweeping phrase used in this section "any rights or property" obviously includes not only land and rights of way, but water rights.[7]

By Section 8 of the 1902 Act, the Secretary of the Interior "in carrying out the provisions of this act" is required to "proceed in conformity with" state laws. In order to proceed in conformity with those laws, he has been required, and it has been his regular practice, to obtain water rights by appropriation, purchase or condemnation. The rights so obtained, being subject to state laws, are, inescapably, subject to such prior existing water rights as are recognized by those laws. The rights recognized by the state laws are, in one or another of the states, either exclusively appropriative, or both appropri-

---

[7]Congressman Mondell, Committee Chairman in charge of the bill categorically so stated on the floor:

> "Section 7 provides means for acquiring lands and water rights, where same may be necessary." 35 Cong. Rec. 6678.

ative and riparian. In whichever class they fall, the Secretary, in setting up and carrying through a reclamation project, takes subject to and is bound to respect prior rights. This has been the law of the United States for nearly half a century. This circumstance has been frequently referred to in the decisions of this Court. In *Nebraska v. Wyoming,* 295 U. S. 40, on motion to dismiss, the Court says, at page 43:

> "The bill alleges, and we know as matter of law (citing Section 8 of the Act of June 17, 1902, 32 Stat. 390) that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the State of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him."

See also:

Nebraska v. Wyoming, 325 U. S. 587, 614, 629;

Mason Co. v. Tax Commission, 302 U. S. 186, 199;

Ickes v. Fox, 300 U. S. 82, 93, 94, 95;

Ide v. U. S., 263 U. S. 497, 499.

As he has proceeded with the development of the reclamation program, the Secretary of the Interior has regularly and fully, in innumerable instances, reported to the Congress that he has conformed to the rules established by Section 8 of the 1902 Act, and Congress has acted in the light of that information.

The Central Valley Project, California was "reauthorized" by Section 2 of the Rivers and Harbors Act of August 26, 1937 (50 Stat. 834, 850). That act declared that, except as otherwise provided, "the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals . . . and incidental works deemed necessary to said entire project." This reauthorization under the reclamation laws was reiterated in Section 2 of the Rivers and Harbors Act of October 17, 1940 (54 Stat. 1198, 1199), which added the authority for the "construction under the provisions of the Federal reclamation laws of such distribution systems" as were necessary to the project. So, the Secretary, in carrying on the Central Valley Project under the reclamation laws, must abide by Section 8 and the water rights he obtains, from whatever source, are subject to all prior rights which are vested under the State law of California.

The next act by which the policy of the United States has been established and declared with respect to navigable streams is Section 1(b) of the Flood Control Act of 1944 (Act of Dec. 22, 1944, 58 Stat. 887) which reads:

> "The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian, shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes."

By this section, the policy of the United States is broadly declared as to projects authorized by the act in the West.[8] The Federal power to improve navigation in the West is positively subordinated, so that it shall not conflict with the consumptive uses of water, such as domestic and irrigation use. The same provision has been repeated in each of the Flood Control and Rivers and Harbors Acts adopted since 1944. The provision evidences a realistic acceptance by the Congress of the prime necessity of devoting to consumptive uses in the western states all of the waters which can be so applied. The Congress has thereby indicated its plain intention that in the 17 western states the navigation power, whether or not in the absence of such a statute it might, shall not override the consumptive uses, which are the indispensable prerequisite of the existence of any substantial civilization in the western states.

Amici curiae have herein reviewed, without elaboration of detail, some high points of western water law and the Acts by which Congress has recognized rights to use of water for consumptive purposes under that law. The main question now appears to boil down to this: Is the rule of the *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, the correct rule to apply to consumptive water rights on navigable streams in the West?

If so, respondents are out and injured. And while their private fortune is of no interest to anyone but themselves, the establishment of such a rule by this Court would be of most intense concern to the thousands upon thousands of water users in every State in the West,

---

[8]Nine of these projects are located within the Central Valley Project area.

who have believed themselves shielded by the Acts of Congress and justified in their labors and expenditures in building their irrigated farmsteads. These thousands would now find themselves in jeopardy.

If not, then water users in the West can with confidence pursue the development of their lands, with the knowledge that if public necessity requires that they be dispossessed, they are entitled to just compensation.

Amici curiae consider that one of the recent decisions of this Court, which follows the *Chandler-Dunbar* case, contains the key to the problem. In *United States v. Willow River Power Co.*, 324 U. S. 499, the reasoning of the Court shows clearly why the *Chandler-Dunbar* rule does not apply to consumptive rights to water in the West. The Court says, at page 502:

> "The Fifth Amendment, which requires just compensation where private property is taken for public use, undertakes to redistribute certain economic losses inflicted by public improvements so that they will fall upon the public rather than wholly upon those who happen to lie in the path of the project. It does not undertake, however, to socialize all losses, but those only which result from a taking of property. If damages from any other cause are to be absorbed by the public, they must be assumed by act of Congress and may not be awarded by the courts merely by implication from the constitutional provision."

The Court says further:

> "But not all economic interests are 'property rights'; only those economic advantages are 'rights' which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law long has recognized that the

> right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute 'property rights' in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered. Such economic uses are rights only when they are legally protected interests."

Amici curiae suggest that no Act of Congress has given anything other than conditional or temporary protection to the use for power production of waters of navigable streams in the East. That was the "right" asserted by the riparian owners in the *Chandler-Dunbar* and subsequent cases.

On the other hand, Congress has repeatedly and unequivocally, in the Act of July 26, 1866, the Reclamation Act of June 17, 1902, and the Flood Control Act of 1944, given express protection and recognition to Western irrigation and domestic water rights. Those rights which are vested according to the laws of the Western States are, by the law of the United States, to be respected. In Mr. Justice Jackson's words they "have the law back of them." They are "legally protected." They are, therefore, "property rights." The Secretary of the Interior, whether he might wish to, or not, cannot carry out reclamation work under the Act of 1902, except in conformity with the law of the State and subject to prior rights vested by the law of the State. That, this Court said in *Nebraska v. Wyoming*, 295 U. S. 40, 43, "we know as matter of law."

What is the result? There is shown to be present a vested property right, not the "qualified" title described in the *Chandler-Dunbar* case. This vested property right is, then, within the protection of the Fifth Amendment and "cannot be taken without just compensation."

The case of *New Jersey v. New York*, 283 U. S. 336, involved an Eastern stream. Nevertheless the classic remarks of Mr. Justice Holmes therein (p. 342) illuminate any consideration of the use of the rivers of the West:

> "A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it."

So, *amici curiae* cannot too strongly emphasize the incalculable values to the civilization of the Western states of the use of the Western rivers for irrigation and domestic purposes. The land, without water, is generally of little or no value. The western third of the United States must, within the rigid limitations imposed upon it by nature, produce and continue to develop the production of its own food supply and its contribution to the food supply of the Middle West and East. It must continue to provide adequate reserves of domestic water for its rapidly growing urban centers. The Congress has faced this problem realistically and has acted in a wise and far-seeing way to establish a sound public policy. Should the contentions herein made by the Executive prevail, disruption of values of property and of confidence in the Federal government among the countless water users of the 17 Western states would ensue. Under no circumstances should this Court allow the Executive to divert the policy of the nation from that which Congress has declared.

II.

The Opinion of the Court of Claims Below Does Not Adequately State the Effect of the Amendment of 1928 to Article XIV, Section 3, of the California Constitution.

The State of California is the only one of present *amici curiae* which is interested in this point. It desires that the record be kept straight, and that this Court be informed as to the official views of California concerning the meaning and effect of the 1928 Amendment. It is considered that the opinion of the Court of Claims does not fully nor adequately state the effect of the 1928 Amendment.

In the actions at bar the defendant United States is an appropriator and the plaintiffs are riparian owners of lands bordering on overflow channels of the San Joaquin River, which lands are situate down stream from the point of appropriation, Friant Dam. Exactly the same river, the same relative position of the parties, and the same type of use (flood irrigation of pastures) were present in *Herminghaus v. Southern California Edison Co.*, 200 Cal. 81, Cert. dismissed 275 U. S. 486. The California court there held that plaintiff's land was riparian, that the use of annual floods for irrigation by overflow was a reasonable, beneficial use, and that as between a riparian owner and an appropriator, the riparian was not limited by any rule of reasonableness.

The 1928 Amendment to Article XIV, Section 3, was directed against this latter part of the decision. The arguments officially submitted to the voters at the election held November 6, 1928, at which the Amendment was adopted, stated in part as follows:

> "This amendment to the state Constitution affects all of the people in this state, those in the cities as well as those in the country.

"Its purpose is to prevent the waste of the waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea.

"It allows water which now so runs to waste to be conserved and used for the benefit of all of the people in the state . . .

"While this amendment protects all water rights to the full extent to which they can be put to reasonable beneficial use in some reasonable way, and this includes the riparian owner as well as others, nevertheless it is an effort on the part of the state, in the interest of all of the people of the state, to conserve our waters. It will change the present theory of the law that now permits the unused, unrestrained and undiminished flow of our streams to the sea to be interpreted as a beneficial use of the water in this semiarid state, where all lands, including riparian lands, need artificial irrigation in summer and fall, and all our cities need stored water for domestic use.

"Under present interpretations the riparian owner is not bound by any rule of reasonableness in the use of water.

"For example, in the Herminghaus case it was held that approximately 97 per cent of the water of the streams should flow by the land, in order that 3 per cent might be used for irrigation.

"The development of California requires that a different rule from this be adopted. The amendment preserves to the riparian owner all the water to which he may be entitled for beneficial use by reasonable methods of use, but requires that the unwarranted and needless waste of water should be prevented.

"This is a common sense rule of the utmost importance to, and should be adopted for, the future growth of our state and cities."

It is settled in California that such argument may be resorted to in order to resolve doubt as to proper construction of measures voted by the electors.

Chow v. Santa Barbara, 217 Cal. 673, 700;

Turlock Irrigation District v. White, 186 Cal. 183, 184, 187.

Following the Amendment, the California court, applying it, has repeatedly reversed, in whole or in part, judgments which followed the *Herminghaus* case and enjoined appropriators.

Peabody v. City of Vallejo, 2 Cal. 2d 351;

Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489;

Lodi v. East Bay Municipal Utilities District, 7 Cal. 2d 316;

Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677;

Rancho Santa Margarita v. Vail, 11 Cal. 2d 501.

In *Chow v. City of Santa Barbara*, 217 Cal. 673, 700, the first California decision interpreting the constitutional amendment, and in the foregoing cases, it is made clear that the constitutional amendment condemns wasteful flow of water to the ocean. The particular waste condemned is that indicated in the text of the above quoted argument to the voters, which states that the purpose is "to prevent the waste of waters of the state resulting from an interpretation of our law which permits them to flow unused, unrestrained and undiminished to the sea."

The cases under review are radically different from the most of the above cases, in that no issue relating to injunctions is involved. One of those cases, however, was remanded with directions to fix the value of the riparian

right and is, therefore, of peculiar interest here. (*Hillside Water Co. v. City of Los Angeles*, 10 Cal. 2d 677.) That value, naturally, has been depreciated by the constitutional amendment, due to the limitations thereby imposed, particularly in connection with the restrictions upon issuance of injunctive process to enforce the right. This element runs through all the cases herein cited which have construed the effect of the Amendment. The right itself, however, still exists. For example, in *Peabody v. Vallejo*, 2 Cal. 2d 351, 374, the court says:

> "There is and should be no endeavor to take from a water right the protection to which it is justly entitled. The preferential and paramount rights of the riparian owner, . . . are entitled to the protection of the courts at law or in equity . . . If the exercise of the appropriative right cause a substantial diminution of the supply the owner is entitled to compensation for the resulting damage to his lands."

Again in the conclusions stated in the opinion, the court says, at page 383:

> "That if, as to any plaintiff, no substantial damages be proved, but a paramount or preferential right be shown, he is entitled . . . to compensation for the extinguishment of the paramount right . . .; that if substantial damages result to the plaintiffs or any of them by reason of the continuance of the defendant's enterprise, taking into consideration the tests to be applied in the conservation and reasonable use of water now required by the law, such plaintiffs are entitled to the ascertainment of such damages . . ."

In the *Herminghaus* case, it was held that the riparian right extends to all ordinary flows, except extraordinary flood flows. (200 Cal. 81, 100.)

In the *Peabody* case, *supra*, at pages 365, 368, it is held this distinction between extraordinary and other flood flows no longer exists.

Thus, to the extent the riparian owner needs the water for reasonable beneficial use, his right extends to the entire flow of the stream.

In *Meridian Ltd. v. San Francisco*, 13 Cal. 2d 425, at page 445, it is said:

> "In the cases referred to it was established that by the changes in the law the right to use the waters of rivers and streams of the state has been limited to a reasonable beneficial use; that the riparian owner has a prior and paramount right to this use and if necessary is entitled to the full natural flow of the stream or its equivalent undiminished in quantity and unimpaired in quality. The riparian owner is safeguarded in this right by the constitutional amendment. But the amendment also provides that 'riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section . . .' This provision clearly means that when the law has guaranteed to the riparian owner the use of the waters of the stream to the full extent to which he may put the same for all present and prospective useful and beneficial purposes, and has made available to him the means of protecting the rights so guaranteed he has received the full measure of benefit and protection to which he is entitled and can claim no more."

It is incumbent upon the riparian owner to show what quantity of water he needs for reasonable beneficial use on his riparian land. The question is one of fact, and the trial court should make a finding thereon. (*Tulare*

Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489.) To the extent the riparian owner claims the right to maintenance of the full flow of the stream to make water available to his land, he also has the burden of establishing that that constitutes a reasonable method or means of use, and the court should make its finding thereon.

If the court were to find the claimed means of use to be unreasonable, it would not necessarily follow that the riparian right no longer existed, or was of no value, for the Court in appraising the riparian right must consider all possible present and reasonably prospective future uses for which the land is, or may be adapted.

Peabody v. Vallejo, supra;

Meridian, Ltd. v. San Francisco, supra.

If the claimed means of use be found unreasonable, possibly others could be devised which would not be.

The case at bar involves, not injunction, but evaluation of a riparian right in terms of money. In such a case it is not incumbent upon the defendant to "devise some physical solution" whereby the plaintiff's needs can continue to be satisfied, but the defendant may advance such a physical solution if it so desires for the purpose of minimizing damages, or to avoid them entirely. It is under no "obligation" to do so.

Hillside Water Co. v. Los Angeles, 10 Cal. 2d 677.

In the cases at bar, the defendant advanced no such solution and, therefore, a discussion of the physical solution, is, for present purposes, irrelevant. It is only in cases where the defendant chooses to advance a "physical

solution" as a means of mitigating or avoiding damages that this factor becomes material. The Court of Claims, therefore, was slightly inaccurate in saying that the plaintiffs "had the right to demand" that the defendant provide a physical solution.

76 Fed. Supp. 87, 95.

However, except for this inaccuracy, the State of California sees nothing in the decisions of the Court of Claims herein which conflicts with the decisions of the Supreme Court of California as to the effect of the Constitutional Amendment of 1928 to Article XIV, Section 3, of the California Constitution. So far as the Constitutional Amendment is concerned, the decisions of the Court of Claims seem to be the normal and natural application of the law as developed by the California courts since the 1928 Amendment.

In the consideration of this subject, it should at all times be realized that the United States is, in this case, in the position of an appropriator of water at Friant Dam, subject to the application of the laws of California with respect to water rights. (Sec. 8, Act of June 17, 1902, 32 Stat. 388.) It does not hold title to its appropriated rights at Friant Dam in any personal capacity, nor in any sovereign capacity as of its own right. It holds those rights only as trustee for the benefit of the Central Valley Project. The beneficial ownership of those rights belongs, as is settled, to the water users on the Central Valley Project, and the United States is only a storer, carrier and distributor of the water, not the owner of the water right.

Ickes v. Fox, 300 U. S. 82, 93, 94, 95;

Nebraska v. Wyoming, 325 U. S. 587, 614.

Accordingly, considerations drawn from the character and powers of the United States, as a sovereign, should not be permitted to color the picture.

Conclusion.

For the reasons set out above, the States of California, Idaho, Kansas, Nebraska, Nevada, New Mexico, North Dakota, Oregon, South Dakota and Washington submit that the decision below should be affirmed.

February 16, 1949.

Respectfully submitted,

FRED N. HOWSER,
Attorney General of California.

ARVIN B. SHAW, JR.,
Assistant Attorney General of California,

ROBERT E. SMYLIE,
Attorney General of Idaho,

EDWARD F. ARN,
Attorney General of Kansas,

JAMES H. ANDERSON,
Attorney General of Nebraska,

ALAN BIBLE,
Attorney General of Nevada,

JOE L. MARTINEZ,
Attorney General of New Mexico,

NELS G. JOHNSON,
Attorney General of North Dakota,

GEORGE NEUNER,
Attorney General of Oregon,

SIGURD ANDERSON,
Attorney General of South Dakota,

SMITH TROY,
Attorney General of Washington.

Of Counsel:

GILBERT F. NELSON,
Deputy Attorney General of California.

HENRY HOLSINGER,
Principal Attorney, Division of Water Resources of California.

NORTHCUTT ELY,
Special Counsel, Colorado River Board of California.